No. 86-1283

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

ROBERT KAMEAN, RAY E. COFFIE and TERRELL WILLIAMS, Individually and on behalf of all other members of Local 363, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America,

Petitioners,

vs.

LOCAL 363, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

In the event a named plaintiff accepts a "settlement offer" after a District Court denies its application for class action certification, does the named plaintiff have standing to appeal the order denying class certification?

This Court has specifically left this issue open. The Second Circuit opinion in this action holding that plaintiffs' lacked standing directly conflicts with a decision by the Eleventh Circuit.

This Court should not allow the conflict between the Circuits to "percolate".

PARTIES TO THE PROCEEDINGS

The following are the respondents in this Court:

Local 363, Gordon J. Canizio, Patrick Bellantoni, Aaron Kleinman and Richard Roes, individually and as officers or directors of Local 363, the latter name being fictitious and intended to represent all other directors or officers of Local 363; Douglas H. Windel, Gordon J. Canizio, Patrick Bellantoni, Joseph G. Canizio, Alfred Bellantoni, Aaron Kleinman, Anthony Cardillo, David Stoller, Russell Vensk, Eugene Iovine, Aaron Birdoff, Alan Westman, Murry Glick, Joe Joes, individually and as trustees or administrators of Local 363's Employees Benefit Trust, the latter name being fictitious and intended to represent all other trustees and/or administrors of Local 363's Employees Benefit Trust; Expert Electric, Inc., A.N. Electric Corp., Moss Electric Air Conditioning Corp., Action Electrical Contractors, Inc., Bran Electric Co., Inc., G & R Electrical Contractors, Inc., Gilston Electrical Construction Corp, Eugene Iovine, Inc., Kew Electrical Co., Inc., Lipco Electrical Corp., Monarch Electrical Contracting Corp., Newman Electrical Corp., Supreme Electrical Corp., Tap Electrical Contracting Service, Inc., Technicon-Suriano Corp., Joseph P. Tuzzulo, Inc., Avendale Electrical Contractors, Inc. and John Does, the latter name being fictitious and intended to represent all other corporations or legal entities which were a party to a collective bargaining agreement with Local 363; Frank Micellota, Joseph Guttman, Nicolo Argano, Lazar Moses Anthony Spina, Richard Siedl, Gregory Rigas, Marvin Gilston, Eugene Iovine, Fivel Kahan, Gaspare Lipari, John Livia, Victor Neuman, George Holnes, Anthony Cardillo, Joseph A. Suriano, Joseph P. Tuzzolo, Gabriel Blau, and Robert Roberts, the latter name being fictitious and intended to represent all officers, stockholders or partners of the John Does.

Petitioners, Robert Kamean, Ray E. Coffie, and Terrell

Williams, individually and on behalf of all other members of Local 363, pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above entitled proceeding on November 6, 1986.

Petitioners have no parents, affiliates or subsidiaries.

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No.

In The

Supreme Court of the United States

October Term, 1986

ROBERT KAMEAN, RAY E. COFFIE and TERRELL WILLIAMS, Individually and on behalf of all other members of Local 363, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America,

Petitioners,

vs.

LOCAL 363, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Robert Kamean, Ray E. Coffie and Terrell Williams, individually and on behalf of all other members of of the putative class respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States

Court of Appeals for the Second Circuit, entered in the above proceeding on November 6, 1986.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit dated the 6th day of November, 1986 is unreported; the opinion of the District Court is reported at 109 F.R.D. 391 (S.D.N.Y. 1986). Both are reprinted as Appendix A and B respectively, commencing with 1a.

JURISDICTION

Petitioners brought suit in the Eastern District of New York (which was later transferred to the Southern District of New York) under 29 U.S.C. § 185(a) and 28 U.S.C. § 1132 and invoked federal jurisdiction under 29 U.S.C. §185(a), 28 U.S.C. § 1337, 18 U.S.C. § 1964, 28 U.S.C. § 1132 and principles of pendent jurisdiction.

On the 7th day of February, 1986, the District Court denied petitioners' application for class certification. On November 6, 1986, the Circuit Court dismissed the appeal to review the denial of class certification based upon a lack of standing.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The issue sought to be reviewed involves the interpretation of Article III, Section 2, Clause 1 of the United States Constitution.

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution,

> the Laws of the United States and Treaties made, or which shall be made under their Authority — to all Cases affecting Ambassadors, other public Ministers and Consul; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and citizens of another State; — between citizens of different States; — between citizens of same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

The named plaintiffs commenced this action on behalf of themselves and others who were (i) either present or past members of Local 363, (ii) worked on public works contracts for contractors who had entered into a collective bargaining agreement with Local 363; and (iii) failed to receive their rightful wages and benefits as a result of a conspiracy entered into by the defendants.

The record disclosed widespread abuses and underpayments and the failure of respondent Local 363 and the Trustees of Local 363's benefit funds (Trustees) to redress the wrongs as required by the collective bargaining agreement.

Prior to the commencement of the class action, the three named plaintiffs and others complained to government authorities about the underpayments.[1] Though the government authorities had administratively determined that monies were due, none were

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1. Under the Davis-Bacon Act, 40 U.S.C. § 276(a) and New York State Labor Law § 220, employers must pay prevailing wages and benefits on federal, state and city projects.

forthcoming. Plaintiffs and others then discussed their situation and realized that complaining to Local 363 and the Trustees would be fruitless.

Messrs. Kamean, Coffie and Williams brought the action on behalf of those who had complained to governmental authorities, as well as those who had not. However, the named plaintiffs could not afford to fully finance the litigation. They requested assistance from the Joint Industry Board of the Electrical Industry (JIB). The JIB oversees and polices the electrical industry in New York City to insure, among other things, that prevailing wages and benefits are paid to electrical workers on public works projects. The JIB agreed to pay the legal fees of the litigation subject to reimbursement if counsel fees were awarded.

Though the District Court held that plaintiffs established sufficient numerosity and that there were common issues of law and fact present as required for class certification, it nevertheless denied class certification based upon what it characterized as conflicts of interest (1) among the members of the class; and (2) between the prospective class and the law firm of McDonough Marcus Cohn & Tretter, P.C. The court reasoned that the first conflict existed due to the fact that proposed class consisted of present and past members of Local 363 and the second conflict existed because a third party and not the plaintiffs was paying counsel fees.

After the court's decision and order denying class certification, a pre-trial conference was held on May 16, 1986 and a trial date set for June 2, 1986. Faced with an impending trial of the issues, the defendants offered to settle the matter with Messrs. Coffie and Williams based upon determinations of government agencies as to what the defendant employers owed the named plaintiffs. Mr. Kamean was offered binding arbitration solely on the issue of the amount owed to him by his former employer. The

defendants' attorneys represented to the court that the government agencies had withheld sufficient monies to pay the awards to Messrs. Coffie and Williams. Even though the time within which such funds were to be released was indefinite, the District Court stated that the offer was very fair and if it was not accepted a jury would be selected on June 2, 1986. The court went on to state that it was inconceivable that the settlement would be rejected by the plaintiffs and that if the case were tried on the merits, the court would stay execution on the judgment until appellate finality and until the money had been obtained from the governmental administrative agencies.

On June 2, 1986, the parties placed a stipulation on the record whereby the named plaintiffs accepted defendants' offer. The settlement, however, did not resolve the rights of other putative class members who remain uncompensated after the denial of class certification. In an effort to assist those putative class members who had contacted plaintiffs' counsel during the pendency of the instant case (25 in number), a new action was filed on their behalf, in the United States District Court for the Eastern District of New York. *See Colon v. Local 363,* No. 86-2012 (E.D.N.Y., filed June 16, 1986). This action was brought on behalf of only the 25 individual claimants. It is not a class action.

There still remain hundreds of others who were not compensated and will remain uncompensated and without remedy unless the class is certified.

REASONS FOR GRANTING THE WRIT

PLAINTIFFS, WHO ACCEPT A SETTLEMENT OFFER AFTER DENIAL OF CLASS CERTIFICATION HAVE STANDING TO APPEAL THAT DENIAL.

By dismissing the appeal below and holding that plaintiffs lacked standing to appeal the denial of class certification due to acceptance of a "settlement offer" after denial of a motion for class certification, the Second Circuit has limited appellate review beyond any previous limitations imposed by this Court and rendered a decision which directly conflicts with a decision by the Eleventh Circuit.

In *United States Parol Commission, et al. v. John M. Geraghty,* 445 U.S. 388 (1980), this Court specifically reserved and left open the issue of whether plaintiffs who settled their claims after a denial of class certification, may still appeal the denial. 445 U.S. 338 at 404, n. 10.

The Second Circuit and Eleventh Circuit have now taken diametrically conflicting positions. Opposite to the decision in the case at bar, the Eleventh Circuit held, in *Love v. Turlington,* 733 F.2d 1562 (11th Cir. 1984), that a named plaintiff that had settled his claims after denial of class certification had standing to seek appellate review.

The importance of having one standard for appellate review in all Circuits has been a consistent concern for this Court and is nowhere more important than when dealing with class actions.

In class actions, unlike many other plenary actions, the impact of a class action may cross over geographic boundaries with potential class representatives in multiple Circuits. Unless one standard is set for review, forum shopping and inconsistent results

are likely. Consequently, it would be inappropriate to allow the conflict to continue, particularly where this Court has recognized the issue and all arguments have been raised. To allow the conflict to percolate would also continue to place attorneys and named plaintiffs in a dilemma. On one hand, attorneys would have to advise named plaintiffs to accept a settlement if it reflected the sums due them; on the other hand, by so doing, the attorneys and named plaintiffs would be compromising the interests of other putative class members, to whom they also owe a duty.

Besides rendering an opinion contrary to the Eleventh Circuit, the Second Circuit has acted contrary to the reasoning previously enunciated by this Court.

This Court stated in *Geraghty,* 445 U.S. 388, that to satisfy the case or controversy requirement of Article III of the Constitution, a party only had to show a live controversy and a sufficient personal stake in the litigation. This Court held that a live controversy exists if other potential class members could be affected by the matter in controversy and that the personal stake requirement could be satisfied on either of two bases. First, if the plaintiff was acting as a "private attorney general" in his activities for the class, and second:

> As noted above the purpose of the "personal stake" requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions.

Geraghty, 445 U.S. 388 at 403-404.

In the present case, a live controversy exists as numerous

injured parties, other than the named plaintiffs, have commenced actions seeking the same relief that the within named plaintiffs sought on behalf of the class. *See Colon v. Local 363,* No. 86-2012 (E.D.N.Y., filed June 16, 1986). The personal stake requirement has been satisified also. The plaintiffs acted as private attorney generals in seeking to recover unpaid wages due under their collective bargaining agreement, New York State Labor Law § 220 and the Davis-Bacon Act, 40 U.S.C. § 276(a). Moreover, the issues are sharply presented and self-interested parties are vigorously pursuing them. Thus, under the reasoning in *Geraghty,* 445 U.S. 388, plaintiffs had standing to appeal and it was error for the Second Circuit not to consider the merits.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of November one thousand nine hundred and eighty-six.

Present: HONORABLE IRVING R. KAUFMAN,
HONORABLE JON O. NEWMAN,
HONORABLE GEORGE C. PRATT,
Circuit Judges.

86-7543

ROBERT KAMEAN, RAY E. COFFIE, and TERRELL WILLIAMS, Individually and on behalf of all other members of Local Union 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Plaintiffs-Appellants,

v.

LOCAL 363, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al.,

Defendants-Appellees.

This appeal from an order of the United States District Court

for the Southern District of New York, Charles L. Brieant, *Judge*, came on to be heard on a transcript of the record, and was submitted.

ON CONSIDERATION WHEREOF, it is now ordered that the appeal is dismissed.

The three plaintiffs have appealed from an order denying their motion for class certification. They sought to represent a class consisting of all past and present members of Local 363 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America who allegedly were damaged by Local 363's failure to properly calculate the wages and pension contributions owed to them as a result of their employment in New York City public works projects. After the denial of class certification, all three plaintiffs voluntarily settled their individual claims against Local 363.

The appellants lack standing to press their appeal. They no longer have a stake in the outcome of the case, and cannot benefit in any way from a reversal of the denial of class certification. They lack the interest found to exist by the Supreme Court in *Deposit Guaranty National Bank of Jackson, Mississippi v. Roper,* 445 U.S. 326 (1980), in which the aspiring class representatives sought to spread the costs of litigation to other class members who would benefit from any recovery. 445 U.S. at 334 n.6. Here, all litigation costs are being borne by the Joint Industry Board of the Electrical Industry rather than by the plaintiffs. Since they do not stand to benefit from a favorable outcome on this appeal, the named plaintiffs lack "a legally cognizable interest in the outcome", *Powell v. McCormack,* 395 U.S. 486, 496 (1969), and no justiciable controversy is presented.

Appendix A

The appeal is dismissed.

s/Irving R. Kaufman
Irving R. Kaufman, U.S.C.J.

s/ Jon O. Newman
Jon O. Newman, U.S.C.J.

s/ George C. Pratt
George C. Pratt, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported cited, or otherwise used in unrelated cases before this court or any other court.

APPENDIX B—OPINION OF UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Robert KAMEAN, Ray E. Coffie and Terrell Williams, individually and on behalf of all other members of Local Union 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Plaintiffs;

v.

LOCAL 363, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Gordon J. Canizio, Patrick Bellantoni, Aaron Kleinman and Richard Roes, individually and as officers or directors of Local 363, the latter name being fictitious and intended to represent all other directors or officers of Local 363; Douglas H. Windle, Gordon J. Canizio, Patrick Bellantoni, Joseph G. Canizio, Alfred Bellantoni, Aaron Kleinman, Anthony Cardillo, David Stoller, Russell Vensk, Eugene Iovine, Aaron Birdoff, Alan Westman, Murray Glick, Joe Joes, individually and as Trustees or Administrators of Local 363's Employee Benefit Trusts, the latter name being fictitious and intended to represent all other Trustees and/or Administrators of Local 363's Employee Benefit Trusts; Expert Electric, Inc., A.N. Electric Corp., Moss Electric Air Conditioning Corp., Action Electrical Contractors, Inc., Bran Electric Co., Inc., G & R Electrical Contractors, Inc., Gilston Electrical Construction Corp., Eugene Iovine, Inc., Kew Electrical Co., Inc., Lipco Electrical Corp., Monarch Electrical Contracting Corp., Neuman Electrical Corp., Supreme Electrical Corp., Tap Electrical Contracting Service, Inc., Technicon-Suriano Corp., Joseph P. Tuzzolo, Inc., Avendale Electrical Contractors, Inc. and John Does, the latter name being fictitious and intended to represent all other corporations or legal entities which were

a party to a Collective Bargaining Agreement with Local 363; Frank Micelotta, Joseph Guttman, Nicolo Argano, Lazar Moses, Anthony Spina, Richard Siedl, Gregory Rigas, Marvin Gilston, Eugene Iovine, Fivel Kahan, Gaspare Lipari, John Livia, Victor Neuman, George Holnes, Anthony Cardillo, Joseph A. Suriano, Joseph P. Tuzzolo, Gabriel Blau and Robert Roberts, the latter name being fictitious and intended to represent all officers, stockholders or partners of the John Does,

Defendants.

No. 83 Civ. 5125-CLB.

United States District Court,
S.D. New York

Feb. 7, 1986

Steven I. Levin, McDonough, Marcus, Cohn & Tretter, P.C., New York City, for plaintiffs.

Martin M. Ween, Wilson, Elser, Moskowitz, Edelman & Dicker, New York City, for G. Canizio & D. Windle—trustees.

Alan M. Pollack, Feltman, Faresh, Major & Farbman, New York City, for corporate defendants.

Nicholas R. Canizio, Oddo & Canizio, Ozone Park, N.Y., for union.

Appendix B

MEMORANDUM AND ORDER

BRIEANT, District Judge.

As set forth in their amended complaint dated October 4, 1984 and as subsequently modified by orders of this Court, plaintiffs in this case seek to maintain a class action pursuant to Rule 23, F.R.Civ.P., on behalf of themselves and others similarly situated in order to recover damages and unpaid wages and wage benefits allegedly due them in connection with their employment in certain New York City public works projects. The named plaintiffs, Robert Kamean, Ray E. Coffie, and Terrell Williams, are former members of Local 363 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 363"). They seek to represent a class consisting of all present or past members of Local 363 who allegedly were damaged during the six years identified in the complaint by the acts and practices of all defendants.

Pursuant to § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, the plaintiffs have brought suit against Local 363, the trustees and administrators of Local 363's employee benefit trusts, various employers who were parties to the union's collective bargaining agreement, and certain officers and directors of the union and its employers. Subject matter jurisdiction is founded upon these statutes and upon principles of pendent jurisidiction.

This action had received earlier consideration by this Court in connection with opposing motions for summary judgment. Relying on the recently decided case of *Action Electrical Contractors Co. v. Goldin*, 64 N.Y.2d 213, 485 N.Y.S.2d 241, 474 N.E.2d 601 (1984) (hereinafter the "*Action* action"), this

Appendix B

Court dismissed all claims premised on the theory that Local 363 employers had undercompensated plaintiffs by making cash payments of wages and/or benefits in lieu of contributions to the union pension fund. The only claims surviving summary judgment were those based on the allegation that the Local 363 employers had miscalculated the wages and pension contributions owed, so that the amounts ultimately paid—in whatever form—were less than those actually due.

Accordingly, the following claims of plaintiffs now survive: that, in violation of state and federal law and the parties' collective bargaining agreement, the employers had undercompensated plaintiffs and the class they purport to represent for work performed on public work projects in New York City; that the union and the pension fund trustees had breached their duty of fair representation and their fiduciary duty, respectively, by failing to take any action to collect these amounts due; and that the union, the employers and the trustees together "conspired" to deprive these employees of their lawful benefits.

In order to obtain the class certification that plaintiffs now seek by motion fully submitted on November 6, 1985, the plaintiffs must demonstrate that each of the four prerequisites set forth in Rule 23(a), F.R.Civ.P., have been satisfied and, in addition, that at least one of the factors described in Rule 23(b) is present. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 162-63, 94 S.Ct. 2140, 2145, 40 L.Ed.2d 732 (1974).

First, the plaintiffs must establish that the class they purport to represent is so numerous that joinder of all the aggrieved individuals would be impractical. *See* Rule 23(a)(1), F.R.Civ.P. In their complaint, the plaintiffs allege that approximately 1,000 other present and former Local 363 members were similarly

underpaid, a figure based on their estimate of the number of union members who had worked for Local 363 employers while the disputed payment practices were in effect. Although their supporting affidavits specifically identify only 33 potential class members of the 1,000 alleged, this discrepancy is not fatal to their request for certification, especially when the exact number of affected persons is known to the defendants and therefore could be ascertained by the plaintiffs in the course of discovery. *See Folsom v. Blum,* 87 F.R.D. 443, 445 (S.D.N.Y. 1980); *Robertson v. National Basketball Association,* 389 F.Supp. 867, 897 (S.D.N.Y.1975). This Court concludes that the numerosity element of Rule 23(a) has been satisfied.

To satisfy the second prerequisite for obtaining class certification under Rule 23(a), the plaintiffs must prove that the dispute presents questions of law or fact that are common to all members of the prospective class. *See* Rule 23(a)(2), F.R.Civ.P. This does not mean that all issues must be identical as to each member, but it does require that plaintiffs identify some unifying thread among the members' claims that warrants class treatment. *See Blackie v. Barrack,* 524 F.2d 891, 902 (9th Cir. 1975), *cert. denied,* 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed. 2d 75 (1976); *Vulcan Society v. Fire Department of White Plains,* 82 F.R.D. 379, 401 (S.D.N.Y.1979).

In this case, the issues presented by the plaintiffs regarding the employers' methods of calculating their employees' wages and benefit compensation and the union's and the trustees' alleged breach of their fiduciary obligations raise common questions of fact and law sufficient to meet the requirements of Rule 23(a)(2). Each potential class member is or was a member of Local 363; each was employed by a company that had signed a collective bargaining agreement with the union; and each was subject to

the same payment practices that plaintiffs now contend were improper. Accordingly, this Court is satisfied that this requirement has been met.

The third prerequisite for maintaining a class action under Rule 23 focuses attention on the individual claims of the representative parties, i.e., the named plaintiffs, to determine whether they are sufficiently typical of those asserted by the remaining class members. *See* Rule 23(a)(3), F.R.Civ.P. To state this requirement another way, the plaintiffs must show that their interests are aligned with the interests of their fellow class members in order to ensure that each claim will be prosecuted with diligence and care. *Morgan v. Laborers Pension Trust Fund of Northern California,* 81 F.R.D. 669, 677 (N.D.Cal.1979). As applied to these facts, this inquiry substantially overlaps the concerns incorporated into Rule 23(a)(4), i.e., that the plaintiffs demonstrate they will "fairly and adequately protect the interests of the class" they seek to represent. Rule 23(a)(4), F.R.Civ.P.

Therefore, in order to maintain this action on behalf of the proposed class, the plaintiffs must demonstrate not only that they share the general interest of the absent class members in recapturing the compensation allegedly due them, but also that they do not possess other, potentially conflicting interests that could impair the faithful performance of their duties as class representatives. *See Hansberry v. Lee,* 311 U.S. 32, 44, 61 S.Ct. 115, 119, 85 L.Ed. 22 (1940). It is axiomatic that no party can fairly or adequately represent the interests of the absent class, if he is also motivated by interests adverse to the class as a whole. *See id.* at 45, 61 S.Ct. at 120. Accordingly, to satisfy this requirement, the named plaintiffs must demonstrate that neither they nor their attorneys are subject to extraneous influences that would create a conflict.

Appendix B

Sources of potential conflict are not confined to pecuniary interests. Lawsuits fueled by the spite or hostility of an unduly antagonistic litigant or by some other ulterior motive or irrational purpose unrelated to the claims alleged in the complaint may also prevent class certification. *See Norman v. Arcs Equities Corp.*, 72 F.R.D. 502, 506 (S.D.N.Y.1976).

In this case, the named plaintiffs have failed to discharge their burden to demonstrate that they possess the necessary capacity for fair representation of the absent class members. The record before me shows that two of the three named plaintiffs (and some of the proposed class members) presently belong to a rival union having a recent history of antagonism towards, and competition with, the defendant union. The third plaintiff, Coffie, has resigned from the defendant union and is presently competing with the class in the capacity of a self-employed electrical contractor. Because the representatives and the class members are united in their interest to recapture wages and benefits allegedly denied them, there is little doubt that these claims will be prosecuted vigorously. However, this Court is not prepared to infer fair representation merely from the likelihood of vigorous representation. The loyalty of two of the named plaintiffs to their present union, Local 3 of the International Brotherhood of Electrical Workers ("Local 3"), conflicts directly with the interests of those class members, a majority, who have retained their affiliation with Local 363. *See United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1285 (7th Cir.1985). Local 3 actively competes with Local 363 for covered employees and employers, and according to one survey cited by the New York Court of Appeals has enrolled approximately 90% of the unionized electrical workers in New York City. *See Action* action, 64 N.Y.2d at 218, 485 N.Y.S.2d 241, 474 N.E.2d 601. Unlike those class members who still depend upon Local 363 for their

livelihood, the named plaintiffs have no stake whatsoever in the continued economic viability of Local 363 or in its ability to survive a protracted and costly lawsuit. This conflict is itself grounds for denying class representative status to the named plaintiffs. *See Free World Foreign Cars, Inc. v. Alpha Romeo S.P.A.*, 55 F.R.D. 26, 29 (S.D.N.Y.1972). The same logic applies to a non-union electrician seeking to maintain a class action under these circumstances.

Moreover, as members of competing Local 3, at least two of the named plaintiffs possess a powerful incentive to dismember Local 363 and divide it from its affiliated contractors, an interest that would inevitably compromise their duty to seek and obtain for the absent class members the most favorable resolution of this dispute. Class representatives owe a duty to the class not only to prosecute the lawsuit vigorously, but also to consider the advantages of settlement and to negotiate wisely and prudently when settlement is in the long term interest of the class, even at the cost of possible total victory. *See Rossini v. Ogilvy & Mather, Inc.*, 80 F.R.D. 131, 135 (S.D.N.Y. 1978). If, as in this case, the class representatives are not motivated by the same interests and concerns as the absent class members, then there is no assurance that the important litigation decisions made will fairly and adequately vindicate the claims of the absent class members who will be bound by them thereafter. This observation extends to decisions in litigation of the sort which are commonly made by inaction, such as the failure to open or reopen settlement negotiations.

The disquieting entanglement of Local 3 and Local 363 members that would be engendered by this lawsuit if it were granted class action status would also afford the named plaintiffs access during pre-trial discovery to information about Local 363

employers and their records, which could be useful to Local 3 in its organizing efforts. In short, the absent class members and their own local union can expect to pay a steep price for the free prosecution of their claims offered by these individuals who seek to represent them.

The named plaintiffs have also failed to establish that their counsel would be fair and adequate advocates of the class interests. The entire cost of this law suit, including all legal fees, has been or will be paid for by an organization known as the Joint Industry Board of the Electrical Industry, which, except for one independent public appointee, is composed entirely of representatives from Local 3 and affiliated employers. According to the record submitted with this motion, there are no representatives of Local 363 on that Board.

Even if this Court accepts as true plaintiffs' assertions that the Joint Board will assume an impartial stance, that it will have no strategic input, and that its interests broadly embrace the integrity of the electrical contracting industry as a whole rather than representing a desire to favor Local 3 over another union, the Joint Board, as holder of the purse strings, will enjoy considerable, inappropriate control over this litigation simply because it is capable of withdrawing financing at any time. This threat, or even the possibility of such a threat, necessarily would compromise the independence of class counsel or, at a minimum, influence counsel to consider serving the policies of the Board and, conceivably, the interests of Local 3 as well as or instead of those of the class they purport to represent. In the words of the Gospel, which were cited with approval by the Second Circuit in *York v. Guaranty Trust Co. of New York,* 143 F.2d 503, 514 n. 15a (2d Cir.1944), *reversed on other grounds,* 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), "no man can serve two

masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other." Matthew 6:24.

To permit an unrelated third party to promote and finance this litigation would also require this Court to condone Maintenance, a practice that has been decried because it permits intermeddling by nonparties, and encourages litigants to advance speculative claims at no financial risk to themselves. *See Norman v. Arcs Equities Corp.*, 72 F.R.D. 502, 504 (S.D.N.Y.1976); *see also 3B Moore's Federal Practice*, ¶23-07[1.-1], at 23-218. It would be hazardous to the interests of the class if their claims against Local 363 could be held hostage to the revocable and indeed unenforceable promise of their financial supporter, the Joint Industry Board, not to interfere in this action. The Joint Board's ties to Local 3, evidenced by overlapping membership and the fact that it is funded entirely by contributions from contractors signatory to Local 3 collective bargaining agreements, provide a strong motivation and likelihood for Local 3's interests to affect the course of the litigation.

This Court acknowledges that plaintiffs' counsel have represented the interests of this inchoate class diligently and effectively in stimulating and assisting the administrative investigations conducted by the state and federal labor boards into the payment practices in dispute here. So long as government officials were doing the investigating and the prosecuting, the tensions between Local 3 and Local 363 were not implicated, and there was thus no opportunity for improper influences to come to bear on this action. Indeed, it remains quite likely that these officials will enforce the rights of the absent class as they may be found to exist or require the union or the trustees to do so. However, notwithstanding their faithful past performance, both the proposed class representatives and their counsel in this lawsuit

have critical alliances with and obligations to Local 3 that this Court finds will be impermissible and conflicting. The long shadow cast by Local 3 over this litigation threatens the fair and adequate prosecution of the class' claims, and is likely to frustrate obtaining the most advantageous resolution of a dispute existing essentially between Local 363, its members and their employers.

Accordingly, this Court finds that the named plaintiffs and their attorneys are precluded by conflicts of interests and divided loyalties from representing this class.

The motion for class certification is therefore denied.

Having determined that this lawsuit cannot be maintained as a class action, this Court hereby dismisses the action as it pertains to those defendant contractors and officers with whom the named plaintiffs have no record of employment during the applicable statute of limitations period. Orders effecting these dismissals may be proposed on ten (10) days notice, together with an affidavit setting forth the fact of no such employment. As to such dismissals, the Court declines to make the determinations required by Rule 54(b), F.R.Civ.P., for an entry of partial judgments.

Counsel for the remaining parties shall confer in order that the individual claims of the plaintiffs may be made ready for trial or otherwise resolved without delay and at minimal litigation cost.

So Ordered.

Supreme Court, U.S.
FILED
MAR 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1283

In The
Supreme Court of the United States
October Term, 1986

ROBERT KAMEAN, RAY E. COFFIE and TERRELL WILLIAMS, Individually and on behalf of all other members of Local 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Petitioners,

vs.

LOCAL 363, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

If plaintiff's motion for class certification is denied and thereafter plaintiff voluntarily settles all of his individual claims without retaining any personal stake or interest in the outcome of the controversy, does he have standing to appeal the order denying class certification under Article III, Section 2, Clause I of the United States Constitution?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (hereinafter the "Second Circuit"), dated November 6, 1986, is unreported. (Pet., App. A.) The opinion of the United States District Court for the Southern District of New York (hereinafter "District Court") is reported at 109 F.R.D. 391 (S.D.N.Y. 1986). (Pet., App. B.)

———o———

JURISDICTION

The judgment of the Second Circuit was entered on November 6, 1986. The petition for a writ of certiorari was filed on February 4, 1987. The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

The issue sought to be reviewed involves the interpretation of Article III, Section 2, Clause 1 of the United States Constitution.

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made under their authority—to all Cases affecting Ambassadors, other public Ministers and Consul;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party; to Controversies between two or

more States;—between a State and citizens of another state;—between citizens of different States;—between citizens of same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

———o———

STATEMENT OF THE CASE

A. Nature of Plaintiffs' Complaint

The named plaintiffs commenced this action on behalf of themselves and a putative class consisting of past and present members of Local 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "Local 363"). The overwhelming majority of the putative class were members of Local 363. None of the plaintiffs were members of Local 363 at the time this action was commenced. Two of the three named plaintiffs, Kamean and Williams, and some of the proposed class members belong to Local 3 of the International Brotherhood of Electrical Workers (hereinafter "Local 3"), which is a rival union of Local 363 and has a well documented and judicially acknowledged history of antagonism towards, and competition with Local 363. (Resp., App. A.) The third plaintiff, Coffie, resigned from Local 363 and is presently competing with the Corporate Respondents (hereinafter "Employers") as a self-employed electrical contractor.

This action sought recovery of alleged underpayments of wages and benefit contributions payable by the Employers pursuant to the provisions of a collective bargaining agreement between Local 363 and the Employers

on federal projects under the Davis-Bacon Act, 40 U.S.C. § 276(a) and state projects under the New York State Labor Law § 220.

In this action, plaintiffs alleged that Local 363 breached its duty of fair representation under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 *et seq.* and the Trustees of Local 363's employee benefit plans (hereinafter "Trustees") breached their fiduciary duties under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, by failing to collect the alleged underpayments, and that the Employers, Trustees and Local 363 "conspired" to deprive each member of the putative class of their lawful compensation.

Plaintiffs have not paid and are not obligated to pay for any costs, including legal fees of this action. The entire cost of this lawsuit, including all legal fees, has been and will be paid by an organization known as the Joint Industry Board of the Electrical Industry (hereinafter "Board") which, except for one public appointee, is composed entirely of representatives from Local 3 and its affiliated employers. There are no representatives from Local 363 or its affiliated employers on the Board. In addition to being dominated by representatives of Local 3 and its affiliated employers, the Board is exclusively funded by contractors signatory to Local 3's collective bargaining agreement.

B. District Court's Opinion

The District Court denied plaintiffs' motion for class certification primarily based upon its finding that both plaintiffs and their attorneys were not fair and adequate

representatives of the class as required by Fed. R. Civ. P. 23(a)(4), due to conflicts of interest that existed between: (1) plaintiffs and the majority of the putative class; and (2) plaintiffs' attorneys and the putative class. The District Court found that the loyalty of both Kamean and Williams to their present union, Local 3, "conflicts directly with the interests of those class members, a majority, who have retained their affiliation with Local 363." (Pet., App. B, p.10a.) The District Court further found that "unlike those class members who still depend upon Local 363 for their livelihood, the named plaintiffs have no stake whatsoever in the continued economic viability of Local 363 or in its ability to survive a protracted and costly lawsuit." (Pet., App. B, p.11a.) The District Court, therefore, held that because "plaintiffs possess a powerful incentive to dismember Local 563 and divide it from its affiliated contractors . . ." (Pet., App. B, p.11a) there was no assurance that they would fairly and adequately represent the claims of the members and absent class members who would have been bound thereafter by their actions. The District Court further found that plaintiffs' counsel, McDonough Marcus Cohn & Tretter, P.C. (hereinafter "McDonough-Marcus") was also not a fair and adequate representative of the putative class because the entire cost of this lawsuit, including their fees, was being paid by the Board. The District Court held that as holder of the "purse strings" the Board was capable of withdrawing financing at any time and that "such a threat, necessarily would compromise the independence of class counsel [McDonough-Marcus] or, at a minimum, influence counsel to consider serving the interests of Local 3." (Pet., App. B, p.12a.) Accordingly, the District Court opined that McDonough-Marcus' "critical alliances with and obligations to Local 3 . . . will be impermissible and

conflicting" and thus precluded them from representing the class. (Pet., App. B, p.14a.)

C. Plaintiffs' Settlement Of Their Individual Claims

After plaintiffs' motion for class certification was denied, but immediately before their individual claims were scheduled for trial, each of the plaintiffs voluntarily settled all of their claims against the defendants by executing a Stipulation of Dismissal with Prejudice and a General Release (hereinafter "Settlement Documents"). This settlement resulted in the plaintiffs' relinquishing all of their interests in this litigation in exchange for receiving all of the relief to which they were entitled. By settling their individual claims and having all of their attorneys' fees and expenses paid by the Board, plaintiffs explicitly and completely divested themselves of any personal stake or interest in the outcome of this litigation. However, despite executing the Settlement Documents and receiving all of the benefits of their respective settlements, plaintiffs appealed the denial of their motion for class certification to the Second Circuit.

D. Court of Appeals Decision

In a unanimous decision, the Second Circuit dismissed petitioners' appeal on the grounds that they lacked standing to press their appeal because they "no longer have a stake in the outcome of the case, and cannot benefit in any way from a reversal of the denial of class certification." (Pet., App. A, p.2a.) This decision reflected the Second Circuit's opinion that petitioners no longer had an interest in the outcome of this case because: (1) by voluntarily settling their individual claims they obtained all of the relief to which they were entitled and (2) all of their litigation costs were being borne by the

Board, rather than the plaintiffs themselves. Accordingly, the Second Circuit relying on this Court's decisions in *Deposit Guaranty National Bank of Jackson, Mississippi v. Roper*, 445 U.S. 326 (1980) and *Powell v. McCormack*, 395 U.S. 486, 496 (1969), held that plaintiffs lacked "a legally cognizable interest in the outcome" and "no justiciable controversy" was presented to permit the appeal. (Pet., App. A, p.2a,)

SUMMARY OF ARGUMENT

The Second Circuit correctly applied this Court's decisions in *Roper* and *Powell*, to the facts of this case. Contrary to petitioners' assertions, by voluntarily settling all of their individual claims, receiving all of the relief to which they were entitled, and having all of their litigation costs paid by a third party, petitioners do not have a personal stake or legally cognizable interest in the outcome of this case to permit them to appeal the denial of their motion for class certification. Since petitioners have neither a continuing personal stake in the outcome of this action, nor are their claims capable of repetition yet evading review, the Second Circuit was correct in holding that Article III and the precedents of this Court required dismissal of petitioners' appeal. The Second Circuit's decision is therefore not in conflict with the Eleventh Circuit's decision in *Love v. Turlington*, 733 F.2d 1562 (11th Cir. 1984). Accordingly, review by this Court of the Second Circuit's fact-determined decision is unwarranted and the writ of certiorari should not be granted.

ARGUMENT

The Court Of Appeals Correctly Applied this Court's Precedents

Article III of the Constitution limits federal court jurisdiction to "cases" and "controversies" that are presented by parties who have a personal stake or legally cognizable interest in the outcome of the controversy. *Powell,* 395 U.S. at 496. A party without the requisite personal stake in the litigation is without "standing" to prosecute the action and vitiates the jurisdiction of the federal court to adjudicate the controversy. *Roper,* 445 U.S. at 336; *Flast v. Cohen,* 392 U.S. 83, 101 (1968).

When a class action is commenced two distinct issues are presented for judicial resolution: (1) whether the action satisfies the requirements of Fed.R.Civ.P.23; and (2) whether the substantive allegations in the complaint are meritorious. The denial of class certification is a procedural ruling, which is collateral to the merits of the litigation. This Court has held that such collateral rulings—like other rulings—may be appealed only when the requirements of Article III are satisfied. *Roper,* 445 U.S. at 349.

In *United States Parole Commissions v. Geraghty,* 445 U.S. 339, 404n.10 (1980), this Court expressed no view whether Article III would permit named plaintiffs who settle their individual claims after denial of class certification to appeal from the adverse order. However, this Court has consistently held that the only party who has standing to appeal a decision of a federal court is an individual who retains a stake in the appeal sufficient to satisfy the constitutional requirements of Article III. *Roper,* 445 U.S. at 349. In the present case, the indisput-

able facts in the record clearly demonstrate that plaintiffs: (1) voluntarily settled all of their claims in this controversy; (2) executed Settlement Documents whereby they relinquished any interest in the outcome of this action; (3) received all of the relief to which they were entitled; (4) would not benefit by any prospective relief obtained by the putative class; (5) had all of their litigation costs, including attorneys' fees, paid by a third party, the Board; and (6) alleged claims that are not capable of repetition because they are no longer members of Local 363.

There is neither a split among the circuits nor any ambiguity surrounding this Court's precedents or the Constitution's requirements under Article III concerning the requisite standing an individual must possess to appeal from an order of a district court. Unless a party who settles his individual claims retains a "personal stake" in the outcome of the litigation, he does not have the requisite standing to press the appeal from an order which denies class certification. Due to petitioners' full and final voluntary settlement of all of their claims, and the resultant lack of interest in the outcome of this litigation, their petition does not reach the question reserved by this Court in *Geraghty*.

Although Article III justiciability is "a flexible doctrine of uncertain contours," (*Poe v. Ullman*, 367 U.S. 497, 508 (1961); *Flast v. Cohen*, 392 U.S. at 97), the Constitution imposes a minimum requirement on a plaintiff that in order to satisfy Article III he must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendants throughout the entirety of the litigation. *See Gladstone*

Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975) (quoting *Steffel v. Thompson,* 415 U.S. 452, 459n.10 (1974)). This Court's rule barring litigation by those who have no interest of their own at stake is applied so rigorously that it has been termed the "one major proposition" in the law of standing to which "the federal courts have consistently adhered without exception." *Geraghty,* 445 U.S. at 412; Davis, *Standing: Taxpayers and Others,* 35 U. Chi. L. Rev. 601, 617 (1968).

Although Article III contains no exceptions for class actions, this Court has held that a putative class representative who alleges no individual injury "may not seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton,* 414 U.S. 488, 494 (1974). Only after a class has been certified in accordance with Fed.R. Civ.P.23, can it acquire a legal status separate from the interest asserted by the named plaintiff. *Sosna v. Iowa,* 419 U.S. 393, 399 (1975). Given a properly certified class, the live interest of the unnamed but identifiable class members may supply the personal stake required by Article III when the named plaintiff's individual claim becomes moot. *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 755-756 (1976).

However, in this case, no class has been certified, the three putative class representatives have fully settled their claims and therefore no longer have the slightest interest in the outcome of this action. The case therefore lacks a plaintiff with the personal stake in the outcome which is a constitutional prerequisite to confer jurisdiction under Article III. The only parties who appear to have

an interest in this case are: the Board which is financing this suit; McDonough-Marcus which continues to be paid by the Board; and Local 3 which is attempting to dismember Local 363 as an organized bargaining agent. These parties should not be able to utilize this litigation or this petition as a vehicle to pursue their own self interests.

———o———

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Murphy, P.J., Sullivan, Ross, Asch, Silverman, JJ.

19418 In re Application of Action Electrical Contractors Co., Inc.,
Petitioner, I.B.Lampert

For a Judgment, etc.,
Harrison J. Goldin, etc.,
Respondent, R.Maldonado

That Petitioner, etc.,
New York Housing
Authority, et al.,
Respondents, R.G.Garfinkle

To rescind, etc.,
- and -
Lipco Electrical Corporation,
Respondent.

Determination of the Comptroller, dated October 17, 1983, which, *inter alia,* found that petitioner had wilfully violated Labor Law § 220 subd. 3 on two occasions, confirmed, without costs.

In Labor Law § 220 subd. 3, the Legislature has required that supplements be paid to workmen. Undoubtedly, the Legislature realized that, if cash payments were given to workmen in lieu of supplements, the cash payments could be quickly dissipated. The workmen would thus be left without any protection against future contingencies which might threaten their health or welfare.

In light of the Legislature's policy embodied in Labor Law § 220 subd. 3, it would be improper for this Court to develop a rule of "substantial compliance" or "substituted compliance." Our vote of confirmance is supported by the

only two cases that have directly explored this subject matter (*Matter of Skyway Roofing of Troy, Inc. v. County of Rensselaer,* 79 A D 2d 1078, *lv. to app. den.* 53 N Y 2d 606; *Pilot Mechanical Corp v. Carrol,* 94 Misc 2d 437).

The record contains substantial evidence to support the administrative determination that Action committed violations in failing (i) to provide supplemental benefits and (ii) to maintain records. The other issues raised in Action's brief are merely mentioned in its petition. There was no proof submitted in the record to show that any of those other issues had merit or warranted development at a trial or hearing.

For the reasons stated, we would confirm:

> All concur except Ross and Silverman, JJ who dissent in part in a memorandum by Silverman, J. as follows:

This is an Article 78 proceeding by petitioner Action Electrical Contractors Co., Inc. ("Action") (a) to annul the determination of respondent The Comptroller of the City of New York ("Comptroller") that Action had wilfully violated Labor Law § 220 twice by failing to provide prevailing supplemental benefits to Laborers and electricians, and that Action had failed to maintain records on contracts as required by Labor Law § 220 (3-a); and (b) to direct respondent New York City Housing Authority ("NYCHA") and its Chairman to award Action as the lowest responsible bidder a contract with respect to certain electrical installation at Redfern Houses, Queens.

We would grant the petition to the extent of annulling the determination of the Comptroller, but would dismiss the petition as against the Housing Authority.

The effect of the Comptroller's determination that Action had twice wilfully failed to provide supplements was to render Action ineligible to submit a bid on or be awarded any public work contract with the State, any municipal corporation, or public body ("public agency") for a period of five years (Labor Law § 220-b [3] [b]).

Labor Law § 220 (3) requires contractors with any public agency to pay laborers, workmen or mechanics upon such public works not less than the prevailing rate of wages, and to provide such employees "supplements" in accordance with the prevailing practices in the locality. Supplements are defined as "all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages' within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay and life insurance." Labor Law § 220 (5) (b).

The Comptroller of the City of New York as "the fiscal officer" responsible (Labor Law § 220 [5] [e]) has determined that while Action paid the prevailing wages, it failed to provide prevailing supplements.

Action is a member of the United Construction Contractors Association, which has a collective bargaining agreement with Local 363 of the Teamsters Union. Apparently most of the major electrical contractors in New York City belong to associations which have collective bargaining agreements with Local 3 of the International Brotherhood of Electrical Workers.

This case must be considered in the context and against the background of the continuing dispute between

Local 3 and Local 363 wherein it has been charged and found by some courts that Local 3 is engaged in an effort "to expropriate for itself, electrical work being performed by the Teamsters [Local 363] thus giving Local 3 a monopoly over such work." *National Labor Relations Board v. Local 3, International Brotherhood of Electrical Workers, AFL-CIO,* 542 F2d 860, 865; *see also Allen Bradley Co. v. Local Union #3 International Brotherhood of Electrical Workers,* 325 U.S. 797.

The present prevailing wage and supplement proceeding was precipitated by a complaint forwarded to the Comptroller by a member of Local 3's Joint Industry Board.

The Comptroller, as we have said, found that Action was paying the prevailing rate of wages but it was not providing the prevailing supplements. These supplements are a package of welfare benefits. Each of the two collective bargaining agreements contains a provision for such package. Not unnaturally the packages for welfare benefits in the two collective bargaining agreements are not the same. Because Local 3 apparently represents the large majority of the electricians involved, the Comptroller has taken the provisions of that agreement as the prevailing wages and supplements which must be provided by all contractors doing public work in the city.

The Comptroller's "Schedule of Prevailing Rates of Wages and Supplemental Benefits" lists the supplements by initials, which apparently correspond to the various welfare benefits and funds provided for in the Local 3 contract, giving a dollar cost per day for each. The Comptroller has found the benefits provided for by the Local

363 contract not to be comparable or equivalent to those provided for by the Local 3 contract. Further the Comptroller has found there are some funds or benefits, *e.g.*, the "Additional Security Benefit Fund" provided for in the Local 3 contract, which do not appear among the Local 363 benefits, at least under that name.

As a practical matter, it is impossible in this industry for any moderate sized firm to comply with the requirements of supplemental welfare benefits except through union welfare funds. As Action's association is signed up with Local 363, to whose welfare fund Action contributes, Action and its employees must look to the welfare fund and benefits set up by the Local 363 bargaining agreement. They cannot look to the Local 3 bargaining agreement, for those provisions will not benefit Action's employees.

It appears that the amounts contributed by Action to Local 363 for supplemental benefits are less than those required under the Comptroller's schedule and the Local 3 agreement. In an effort to meet the standards, Action did the best it could: It added up the cost of supplemental benefits as set forth in the Comptroller's schedule, compared that with the amounts it was paying to Local 363 for supplemental benefits, and paid the excess in cash to its employees. (In the case of the occasional "laborers" employed, where there was no applicable collective bargaining agreement, Action paid to those laborers in cash the full amount of the benefit as required by the Comptroller's schedule). It is thus clear that Action was not trying to obtain any advantage for itself by paying less than the Comptrolier's standard for supplemental benefits; it was not cutting its costs to give itself an unfair

bidding advantage over Local 3 contractors; it was giving the full benefits of the supplements—so far as translatable into cash—to its employees. Indeed, the Comptroller found that the damage suffered by the employees, *i.e.*, the value of the benefits they ought to have received but did not, was offset by the additional cash paid by Action to its employees, so that the employees suffered no monetary damage.

However, the Comptroller holds that payments in cash cannot substitute for provision of supplemental benefits. He bases this on the fact that supplements are defined in the statute as remuneration "paid in any medium other than cash," Labor Law § 220 (5) (b). We do not think it necessarily follows that a cash substitute paid by an employer, where the welfare benefit is not available, constitutes a wilful violation. We note that the statute requires the Comptroller to determine "the *amount* of such supplement" (Labor Law § 220 [5] [c]), which suggests that such supplements are translatable into a cash equivalent, and the Comptroller's schedule, as we have said, does state a cash amount with respect to each supplemental benefit.

Further, it appears not to be contradicted that the State Industrial Commissioner (now the State Commissioner of Labor), who is the fiscal officer administering the same statute outside New York City as the Comptroller does within New York City (Labor Law § 220 [5] [e]), holds that supplemental benefits may be paid in cash, cash and benefits, or just benefits, so long as the total cost equals the benefits required by the prevailing practice.

The comptroller by finding two wilful violations (two contracts) has excluded Action—and as a practical matter

has excluded all contractors who do not have a collective bargaining agreement with Local 3—from doing electrical work for the City and public agencies within the City. On its face. this appears to us to be so undesirable a result, not clearly required by statute, as to be arbitrary and capricious. At a minimum, as it clearly appears that Action is doing its best to comply in the situation in which it finds itself, Action's violations are not wilful.

The Comptroller has also held that Action has failed to maintain records on each contract as required by Labor Law § 220 (3-a). This finding is not supported by substantial evidence. The Comptroller's witness conceded that Action's records accurately reflected the payments made by Action to Local 363 and its employees, and it was on this basis indeed that the Comptroller found Action did pay the prevailing rate of wages. The finding of a failure to maintain records is apparently based solely on a failure to produce booklets detailing the supplemental benefits of Local 363. That is not what the statute requires.

Accordingly, we would annul the Comptroller's findings that Action wilfully violated Section 220 of the New York State Labor Law twice; that it failed to maintain records on each contract; and that Action should pay a penalty of $1,500 to the City of New York.

The claim against New York City Housing Authority

With respect to the claim against the New York City Housing Authority the situation is somewhat different. The NYCHA does not make its own determinations as to

whether the contractors have complied with the prevailing wage and supplemental practices. That is done by the appropriate fiscal officer, the Comptroller of the City of New York. Having been informed by the Comptroller that a particular contractor has twice wilfully violated the statute, NYCHA was not acting arbitrarily or capriciously in declining to consider such contractor for work to be done for NYCHA; it was merely obeying the dictates of LABOR LAW § 220-b (3) (b).

Accordingly, we agree that the petition should be dismissed against the New York City Housing Authority.

Order filed.

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Supreme Court, U.S.
FILED
APR 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1283

In The

Supreme Court of the United States

October Term, 1986

ROBERT KAMEAN, RAY E. COFFIE and TERRELL WILLIAMS, Individually and on behalf of all other members of Local 363, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America,

Petitioners,

vs.

LOCAL 363, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

This reply brief is submitted to correct the misstatements by respondents that petitioners have received "all of the benefits of their respective settlements" (p. 5 of Respondent's Brief), and that no case or controversy under Article III of the Constitution exists. (The points addressed in petitioners' initial submission will not be repeated.)

Petitioner Kamean is a party who retains a personal stake and interest in the underlying action sufficient to satisfy the case or controversy requirements of Article III of the Constitution permitting appellate review of the District Court's denial of class certification.

Mr. Kamean's individual action has not been finalized or mooted in the Article III sense, which may have resulted in a jurisdictional bar to the petitioners' appeal, as the stipulation of settlement did not resolve all of the issues before the court. *See, Deposit Guaranty National Bank of Jackson, Mississippi v. Roper,* 445 U.S. 326 (1980), reading:

> Although a case or controversy is mooted in the Article III sense upon payment and satisfaction of a final, unappealable judgment, a decision that is 'final' for purposes of appeal does not absolutely resolve a case or controversy until the time for appeal has run. Nor does a confession of judgment by defendants on less than all the issues moot an entire case; other issues in the case may be appealable.

Roper, 445 U.S. 326 at 333.

The stipulation of settlement made part of the record before

the District Court provided that the determination of the damages due Mr. Kamean would be submitted to binding arbitration and respondents would post a financial security bond in the amount of $20,000 to secure any award.

Respondents have not posted such bond nor has the arbitration proceeding commenced. Further, proceedings may be required before the District Court should respondents fail or refuse to post such bond or proceed to arbitration.

The District Court recognized that Mr. Kamean's individual action was not finalized or mooted in the Article III sense as it retained jurisdiction over the matter. In marking the case settled on June 2, 1986, the District Court stated:

> All right. The case is marked settled in accordance with the stipulation read into the record in open court. The Court reserves jurisdiction solely for the purpose of reopening the case merely to enforce the settlement and for no other purpose.

It is inconsistent that Mr. Kamean's action was mooted and the District Court reserved jurisdiction.

CONCLUSION

The stipulation of settlement of Mr. Kamean's individual action was not final and did not moot his private substantive claim as it did not resolve all of the issues before the court. Mr. Kamean (as well as the other petitioners for the reasons set forth in the petition) retains an individual stake and interest in the underlying action sufficient to satisfy the case or controversy requirement of Article III of the Constitution conferring jurisdiction on the court to review the adverse certification ruling.

Respectfully submitted,

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